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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Native Title Legislation Amendment Bill 2019

Background

1. Central Desert Native Title Services Ltd (**Central Desert**) is a recognised native title service provider for the native title claimants and holders of the central desert region of Western Australia. We carry out the functions of a native title representative body in accordance with Part 11, Division 3 of the *Native Title Act 1993* (Cth) (**NTA**).
2. Central Desert advises and represents the following Registered Native Title Bodies Corporate (**RNTBCs**):
 - a. Kaltupakal Aboriginal Corporation RNTBC;
 - b. Kultju (Aboriginal Corporation) RNTBC;
 - c. Kulyakartu (Aboriginal Corporation) RNTBC;
 - d. Marputu Aboriginal Corporation RNTBC;
 - e. Mungarlu Ngurrarankatja Rirraunkaja (Aboriginal Corporation) RNTBC;
 - f. Ngurra Kayanta Aboriginal Corporation RNTBC;
 - g. Parna Ngururrpa (Aboriginal Corporation) RNTBC;
 - h. Pila Nguru (Aboriginal Corporation) RNTBC;
 - i. Rapi (Aboriginal Corporation) RNTBC;

- j. Tjamu Tjamu (Aboriginal Corporation) RNTBC;
 - k. Tjiwarl (Aboriginal Corporation) RNTBC;
 - l. Wakamurru (Aboriginal Corporation) RNTBC; and
 - m. Yilka Talintji Aboriginal Corporation RNTBC.
3. Central Desert also currently advises and represents the respective applicant in the following native title determination applications:
- a. Nangaanya-ku (WAD 460 of 2018), filed on 9 October 2018 and registered on the Register of Native Title Claims on 9 November 2018; and
 - b. Untiri Pulka (WAD 472 of 2019), filed on 19 September 2019 and currently subject to the registration test.
4. Central Desert also acts for Warnpurru (Aboriginal Corporation), the corporation representing the traditional owners of the Gibson Desert Nature Reserve (**GDNR**), being those persons who, but for the extinguishment of their native title rights and interests caused by the creation of the GDNR on 22 April 1977, would have held native title over the area currently the subject of the GDNR.

A map of the area in respect of which Central Desert provides native title and related services is enclosed with these submissions.

Submissions

5. We note that on 17 October 2019, the Senate referred the *Native Title Legislation Amendment Bill 2019 (Bill)* to the Senate Legal and Constitutional Affairs Committee (**Committee**) for its consideration to proposed changes to the NTA and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act)*. We take this opportunity to provide submissions to the Committee on behalf of our clients. We also acknowledge other native title holders and claimants across Australia and the impact that the proposed amendments may have on these groups.
6. In summary Central Desert broadly supports the proposed amendments to the NTA. With minor qualifications we urge the Committee to recommend that the amendments be passed as a matter of urgency.
7. We outline the reason for our support below.

Role of the Applicant

8. Part 1 of Schedule 1 of the Bill contemplates amendments being made to allow conditions to be imposed on the person (or persons) who jointly comprise the applicant

in native title claim applications or native title compensation applications brought under the NTA.

9. In particular, proposed section 251BA will allow native title claimants to impose limitations on the authority of the persons who comprise the applicant and for these limitations to be set out in the applicants' affidavit of appointment.
10. Central Desert supports the proposed amendment which will ensure that applicants are able to be held accountable to the wishes of the groups that they represent. This is particularly important for groups that are represented by Central Desert who do not have an alternative decision making process and who, instead, make decisions and give instructions by a process of group deliberation and consensus.
11. Central Desert also supports the codification of the decision in *Gebadi v Woosup* [2017] FCA 1467 in proposed section 62B ("General law duties") to ensure that the legal obligations of the applicant to the claim group as a whole are clearly identified in the NTA itself.
12. Part 2 of Schedule 1 identifies proposed changes to the manner in which applicants will be able to make decisions on behalf of the claim group. In particular, the proposed amendments contemplate the creation of a "default rule" whereby the applicant will be taken to act by majority decision, unless a condition on the role of the applicant has been stipulated by the claim group pursuant to section 251BA.
13. Central Desert supports the proposed creation of the "default rule", however this support is conditional upon the enactment of proposed sections 62C(4) and 251BA, which enables the rule to be displaced. Central Desert's view is that the "default rule" may not always be appropriate for decision-making processes that are governed by traditional law and custom. A number of factors – including age, gender and cultural authority – may need to be taken into account when a claim group is asked to consider a matter, and therefore a simple majority decision may not always ensure that a culturally appropriate decision is made.
14. However, Central Desert notes that the proposed insertion of sub-sections 87(1AA) and (1AB) appear to make it a requirement that the members of the applicant sign the terms of the agreement for an order of the Federal Court of Australia to make a consent determination if the requirements of section 87(1) are met.
15. This appears to be at cross-purposes with section 87(1)(b) of the NTA which allows for the agreement to be "signed by or on behalf of the parties". It is unclear how proposed sub-sections 87(1AA) and (1AB) operate in this respect as they appear to indicate that it be a requirement for the applicant to sign the agreement, thus displacing the ability for

legal representatives to sign the agreement on behalf of the applicant. This is particularly important for claim groups in the central desert region as the majority of our clients live in extremely remote locations and are often not readily contactable outside of claim group meetings.

16. Lawyers have duties to the Court and must not act in a manner that is contrary to instructions received from the native title claim group or the applicant and they can be taken to act in a lawful manner to faithfully represent the instructions of their clients.
17. It is not clear if the ability for a legal representative to sign the agreement under section 87(1)(b) is contemplated as a “condition” that would need to be stipulated under section 251BA. Central Desert supports the proposed insertion of sub-sections 87(1AA) and (1AB) but would be given comfort by amendments that make it clear that the applicant need not sign an agreement for a consent determination where the legal representative has signed the agreement on their behalf.
18. Part 3 of Schedule 1 contemplates proposed changes to section 66B of the NTA which have the effect that the persons who constitute the applicant may be altered without an authorisation process where a member of the applicant is deceased or is incapacitated. The proposed amendment would include new sub-sections 66B(2A), (2B) and (2C) which have the effect of ensuring that a claim application is able to continue provided that members of the claim group have determined a process for appointing a new applicant, or for allowing any other members of the applicant group to continue to be authorised to perform that function.
19. Central Desert supports these proposed amendments but notes that there is a missing “or” in-between paragraphs (a), (b) and (c) of proposed sub-section 66B(2B) to make it clear that each of these options are mutually exclusive of each other.

Indigenous Land Use Agreements (ILUA)

20. Part 1 of Schedule 2 of the Bill contemplates proposed amendments to Subdivision B of the NTA which allows for body corporate indigenous land use agreements (**Body Corporate ILUA**) to be made. The proposed amendment to section 24BC will allow Body Corporate ILUAs to be made to cover areas in which native title has been extinguished or which were not claimed for procedural reasons. The ability for native title groups to work with government and other parties to manage and use of land should extend to areas where native title rights and interests cannot be recognised because of extinguishment or previous exclusive possession acts. Central Desert notes that “extinguishment” is a concept that is often foreign to our clients who continue to access and maintain areas of land that have been the subject of historical extinguishing events

in accordance with their traditional laws and customs. Central Desert believes that this amendment will allow RNTBCs to bring extinguished lands back into the Aboriginal estate and will allow for negotiations to take place for areas of country that are important to our clients.

21. Significantly, for the purpose of entering into an area indigenous land use agreement (**Area ILUA**) or alternative procedure indigenous land use agreement, it will be sufficient if a majority of applicants are a party to the agreement. See proposed amendments to sections 24CD, 24CL, 24DE, 31(1B), 87, 87A etc.
22. Schedule 9 of the Bill similarly contemplates a change in response to *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 to confirm the validity of section 31 agreements where not all the persons comprising the applicant had signed the agreement. Central Desert is of the view that this retrospective application will provide certainty for these types of agreements and supports the amendment's retroactive application.
23. Central Desert also notes that the proposed amendments to section 24CH(1) will require a level of scrutiny from the Registrar to be undertaken before an Area ILUA can be registered. Central Desert supports this proposed amendment which will provide a mechanism for oversight in these types of agreements.
24. Proposed sections 24EB(2A) and 24EBA have the effect of ensuring that any acts done in reliance on an ILUA being on the Register will not be invalid if the ILUA is subsequently removed from the Register, with retrospective application to include ILUAs on the Register after the commencement. Central Desert supports the certainty that these proposed amendments will create but notes that there are some circumstances where an ILUA may have been registered without the consent of affected native title holders and the potential interference caused to their native title rights and interests will have no remedy.

Historical Extinguishment

25. Central Desert notes in particular the proposed insertion of section 47C to the NTA proposed by Part 1 of Schedule 3 of the Bill. This provision will have the effect of enabling the historical extinguishment of native title rights and interests in relation to areas subject to national, state or territory parks to be disregarded to allow for the recognition of native title where the parties agree it's appropriate.
26. This proposed provision, if enacted, will have enormously positive consequences for the client groups which Central Desert represents. In particular, for Warnpurru (Aboriginal Corporation), and the people of the GDNr which this corporation represents, the proposed section 47C will open the door to the potential recognition of their native title

rights and interests under the NTA, a door which has otherwise previously been closed to them.

27. As summarised at paragraphs 37 and 38 of the Statement of Compatibility with Human Rights prepared in relation to the Bill:

[37] The insertion of new section 47C recognises the cultural significance that national parks and reserves hold for many native title holders and is strongly supported by Indigenous stakeholders. Many native title holders maintain traditional connections to areas covered by national, state and territory parks, and the exercise of native title rights would generally not interfere or be inconsistent with the protection of these areas – for example, rights to carry out ceremonies or to be buried on country.

[38] The amendment may create opportunities for native title parties and governments to agree to joint or co-management arrangements for parks and reserves. This would further promote the right to enjoy and benefit from culture, including by providing greater opportunities for traditional owners to play a role in the management of parks and to live and work on traditional lands.

28. Central Desert agrees with those comments and supports the proposed insertion of section 47C as a beneficial amendment to the NTA.
29. Part 2 of Schedule 3 makes necessary amendments to section 47 of the NTA to ensure that corporations that do not have “shareholders” are able to attract the beneficial operation of this section. This is a commonsense amendment which reflects the reality that corporations established under the CATSI Act predominantly have members rather than shareholders.
30. In Central Desert’s experience, the definition of “shareholder” in section 47 of the NTA has been interpreted widely in practice to allow for the beneficial operation of the section to apply, however the proposed amendment is welcomed as it will provide certainty about the approach that is already adopted in practice.

Allowing a RNTBC to bring a compensation application

31. Schedule 4 of the Bill allows RNTBCs to bring an application for compensation over an area where native title has been extinguished or otherwise excluded for procedural reasons. We support this amendment. In our view, it is appropriate that in circumstances where Aboriginal communities do not have the benefit of native title rights and interests because of extinguishment or exclusion because of previous exclusive possession acts, they should be afforded the right to pursue a benefit by other means.
32. The ability for a RTNBC to bring a compensation claim for areas which, but for extinguishment, would have been managed by that RNTBC is a commonsense approach

and will ensure that the process for bringing claims for compensation matters is simplified. For example, this amendment will enable a RNTBC to bring a compensation claim for all compensable matters – whether that be the impairment or past extinguishment of native title rights and interests.

Intervention and consent determinations

33. Part 1 of Schedule 5 of the Bill contemplates amendments to clarify the role of the Commonwealth in its capacity, among other things, as an intervenor in native title proceedings.
34. Central Desert does not support the proposed amendment which will have the effect of requiring the consent of the intervenor in various procedural and substantive matters. This is particularly the case where the Commonwealth, as intervenor, has no rights or interests in the land under claim and therefore has only an academic interest in the proceedings. While it is important for the views of the intervenor to be heard in any claim, agreements which determine the rights and interests of parties should not be prevented as a result.

Other procedural changes

35. Part 1 of Schedule 6 of the Bill provides useful procedural amendments to the NTA, including timeframes to ensure that an “independent person” is appointed to hear the objection under section 24MD(6B)(d). Central Desert does not believe that these proposed amendments are controversial.
36. Part 2 of Schedule 6 of the Bill makes a number of changes to the normal negotiation procedures under section 31 of the NTA. Central Desert supports the proposal to insert a new sub-section 31(1A) and (1B) to allow the government party to exclude itself from substantive negotiations where it believes it is appropriate to do so. This accurately reflects the manner in which these types of agreements are currently being negotiated in practice.
37. The proposed insertion of section 41B to the NTA has the effect of making certain information relating to section 31 agreements public. Central Desert believes that agreements reached between two contracting parties should be kept confidential as a matter of public policy and believes that the proposed amendments make it the default position that third parties are able to ascertain the details of those confidential agreements. That there is an ability for a party to “opt out” of making that information publicly available in sub-clause 41B(6)) is of little comfort, given that it is the exception rather than the rule. Central Desert does not support these proposed amendments.

National Native Title Tribunal

38. The proposed changes include the conferral on the National Native Title Tribunal of the function of assisting RNTBCs and common law holders of native title to resolve disputes that arise after a native title determination, in particular where there are disputes between common law holders and the RNTBC.
39. Central Desert notes that disputes between common law holders and the RNTBCs that represent them are rare and that there are a number of avenues currently available for disaffected native title holders to resolve their disputes – including through the dispute resolution clauses of the RNTBCs Rule Book or Constitution, or by making complaints to the Office of the Registrar of Indigenous Corporations. The Bill makes no mention of these other avenues of dispute resolution, which are often more culturally appropriate and cost effective ways of dealing with internal disputes.
40. Central Desert supports the insertion of the assistance function as another avenue of redress for grievances but strongly suggests that this be viewed as a last resort.

RNTBCs

41. We note that Part 1 of Schedule 8 of the Bill also amends the CATSI Act in respect of RNTBC corporate governance and in particular relating to the cancellation of membership and limiting the ground for refusal of membership.
42. Central Desert notes that the proposed amendments are largely in keeping with current practice and that the RNTBCs within our region already have similar clauses in their Rule Books of Constitutions. Our view is that there is an important balance between ensuring that native title holders' rights and interests are being properly protected by the RNTBC and the ability of an RNTBC to be able to expel disruptive members from its lists.
43. Part 4 of Schedule 8 makes it clear that the Federal Court of Australia is to have the sole jurisdiction in relation to matters affecting RNTBCs. The Federal Court has been dealing with native title claim applications since the inception of the NTA and Central Desert is of the view that the judges of the Federal Court have a particular understanding of native title related matters that other jurisdictions do not. Central Desert supports the proposed amendment to section 581-30 of the CATSI Act.

Conclusion

44. For the above reasons, Central Desert broadly supports the proposed amendments and we submit that the Committee recommend that the Senate accept all amendments proposed to the Bill 2019 (with the exception of the amendments in Part 1 of Schedule

5 and Part 2 of Schedule 6) and that the proposed amendments outlined in Part 1 of Schedule 3 relating to the proposal to insert section 47C into the NTA in particular should be passed without delay.

45. If you have any queries about the contents of these submissions, please contact Malcolm O'Dell

Yours sincerely

Malcolm O'Dell
Principal Lawyer

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